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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALLAN J. NICOLOW, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

HEWLETT-PACKARD COMPANY, et al.,

Defendants.

No. 3:12-cv-05980-CRB

CLASS ACTION

MEMORANDUM OF LAW IN
OPPOSITION TO COMPETING MOTIONS
FOR APPOINTMENT AS LEAD
PLAINTIFF

DATE: March 1, 2013

TIME: 10:00 a.m.

CTRM: 6, 17th Floor

1 Central States, Southeast and Southwest Areas Pension Fund (“Central States”) and the
 2 Strathclyde Pension Fund (“Strathclyde”) respectfully submit this response to the competing motions
 3 for appointment as lead plaintiff.

4 Three motions seeking appointment as lead plaintiff pursuant to the Private Securities
 5 Litigation Reform Act of 1995 are pending before the Court.¹ “The ‘most capable’ plaintiff – and
 6 hence the lead plaintiff – is the one who has the greatest financial stake in the outcome of the case,
 7 so long as he meets the requirements of Rule 23.” *In re Cavanaugh*, 306 F.3d 726, 729 (9th Cir.
 8 2002); 15 U.S.C. §78u-4(a)(3)(B)(iii)(I).

9 As the Ninth Circuit instructed, “the district court must compare the financial stakes of the
 10 various plaintiffs and determine which one has the most to gain from the lawsuit.” *Cavanaugh*, 306
 11 F.3d at 730. Courts in this District have applied a variety of metrics to ascertain which movant has
 12 the largest financial interest: namely, the first-in, first-out accounting method (or “FIFO”), the last-
 13 in, first-out accounting method (or “LIFO”), and/or a four-factor inquiry that variously considers
 14 losses, net shares purchased, total shares purchased, and net funds expended. *See generally In re*
 15 *McKesson HBOC, Inc. Sec. Litig.*, 97 F. Supp. 2d 993 (N.D. Cal. 1999) (Whyte, J.). In addition to
 16 these mathematical inquiries, courts must also decide under what circumstances multiple class
 17 members may combine their individual financial interests in order to claim the largest collective
 18 financial interest. *See Cavanaugh*, 306 F.3d at 731 n.8 (“While a ‘group of persons’ can collectively
 19 serve as a lead plaintiff, 15 U.S.C. §78u-4(a)(3)(B)(iii)(I), we are not asked to determine whether a
 20 group can satisfy the ‘largest financial interest’ requirement by aggregating losses.”).

21 Here, if the Court permits the group consisting of PGGM Vermogensbeheer B.V., the State
 22 of Oregon by and through the Oregon State Treasurer on behalf of the Common School Fund and,
 23 together with the Oregon Public Employees Retirement Board, on behalf of the Oregon Public

25 ¹ See Dkt. No. 28 (David Wagner); Dkt. No. 37 (HP Investor Group); Dkt. No. 38 (PGGM
 26 Group); Dkt. No. 42 (IBEW funds); Dkt. No. 49 (Central States and Strathclyde); Dkt. No. 57
 27 (Virginia Retirement System). Mr. Wagner withdrew his motion on February 4, 2013. *See* Dkt. No.
 28 68. The IBEW funds withdrew their motion on February 5, 2013. *See* Dkt. No. 69. The HP
 Investor Group filed a Statement of Non-Opposition on February 8, 2013. *See* Dkt. No. 70.

Employees Retirement Fund and Oklahoma Teachers Retirement System (collectively, the “PGGM Group”) to aggregate their individual losses to collectively claim the largest financial interest, it would appear that the group has the largest losses based upon FIFO or LIFO:

	2008-2012 Class Period		2011-2012 Class Period	
<u>Movant</u>	<u>FIFO Losses</u>	<u>LIFO Losses</u>	<u>FIFO Losses</u>	<u>LIFO Losses</u>
PGGM Group	\$118.4 million	\$84.9 million	\$60 million	\$52.5 million
Va Ret. System	\$53 million	\$39.7 million	\$43.9 million	\$33.5 million
Central States & Strathclyde	\$46.7 million	\$34.9 million	\$11 million	\$9.9 million

If, however, the Court determines that a movant must individually qualify for the largest financial interest without combining losses with other entities, the Virginia Retirement System or PGGM would appear to have the largest individual losses, depending on the metric selected:

	2008-2012 Class Period		2011-2012 Class Period	
<u>Movant</u>	<u>FIFO Losses</u>	<u>LIFO Losses</u>	<u>FIFO Losses</u>	<u>LIFO Losses</u>
Va Ret. System	\$53 million	\$39.7 million	\$43.9 million	\$33.5 million
PGGM	\$57.3 million	\$36.8 million	\$40.3 million	\$35.3 million
Oregon PERF	\$38.8 million	\$29.3 million	\$17.2 million	\$14.7 million
Central States	\$31 million	\$19.3 million	\$2.4 million	\$1.3 million
Oklahoma TRS	\$22 million	\$18.5 million	\$3 million	\$2.3 million
Strathclyde	\$15.5 million	\$15.5 million	\$8.5 million	\$8.5 million
Oregon Common School Fund	\$155,000	\$155,000	\$32,000	\$25,000

If the Court is inclined to look to net funds expended, Central States and Strathclyde fare better than the other movants in the longest period:

<u>Movant</u>	<u>Net Funds Expended</u>
Central States & Strathclyde	\$47.5 million
Va Ret. System	\$37.2 million
PGGM Group	\$17.4 million

By expending the most net funds in the longest class period (2008-2012), Central States and Strathclyde have “been left ‘holding the bag’ when the fraudulent inflation is revealed” – more so

1 than any other movant. *McKesson*, 97 F. Supp. 2d at 996-97 (noting that of all the various metrics
2 and factors proffered by movants, the “net funds inquiry is somewhat more helpful”).

3 Likewise, in the shorter alleged class period (2011-2012), Central States and Strathclyde held
4 100% of the stock they purchased during the class period at the end of the class period when the
5 truth was purportedly revealed. By contrast, the PGGM Group sold almost 70% of their stock
6 purchased during the class period and the Virginia Retirement System sold 24%. Again, it was
7 Central States and Strathclyde that did not profit from the fraud, but rather were “left ‘holding the
8 bag.’” *McKesson*, 97 F. Supp. 2d at 997; *In re Network Assocs. Sec. Litig.*, 76 F. Supp. 2d 1017,
9 1027 (N.D. Cal. 1999) (Alsup, J.).

10 In addition to their substantial financial interest in the relief sought by the class, Central
11 States and Strathclyde “satisf[y] the requirements of Rule 23(a), in particular those of ‘typicality’
12 and ‘adequacy.’” *Cavanaugh*, 306 F.3d at 730. As demonstrated in their motion, Central States and
13 Strathclyde are both typical and adequate. *See* Dkt. No. 49 at 4. In this regard, Central States and
14 Strathclyde’s claims “‘arise from the same course of conduct that gives rise to the other purported
15 class members’ claims,’” the “‘claims are based on the same legal theory,’” and “‘the purported class
16 members and proposed lead plaintiff were injured by the same conduct.’” *Smajlaj v. Brocade*
17 *Comm’ns Sys.*, 2006 U.S. Dist. LEXIS 97618, at *9 (N.D. Cal. 2006) (Breyer, J.) (citation omitted).
18 In addition, Central States and Strathclyde do not have any “interests antagonistic to the proposed
19 class” and have “retained capable counsel.” *Id.*; *see also* Dkt. No. 49 at 4-6.

1 While other movants may claim to possess the largest financial interest in the relief sought by
2 the class, Central States and Strathclyde possess a very significant financial interest in the relief
3 sought by the class and meet the requirements of Rule 23. If the Court determines that neither the
4 PGGM Group nor the Virginia Retirement System is the presumptive lead plaintiff, Central States
5 and Strathclyde remain ready, willing and able to serve as lead plaintiff and vigorously prosecute
6 this case on behalf of the class.

7 DATED: February 8, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2013, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 8, 2013.

s/ Danielle S. Myers

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